

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS CARGILL WALLS,

Defendant-Appellant.

UNPUBLISHED

January 21, 2014

No. 307647

Genesee Circuit Court

LC No. 11-028151-FC

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Defendant Thomas Cargill Walls appeals of right his jury convictions of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Walls to serve 210 to 500 months in prison for his assault with intent to murder conviction and to serve two years in prison for his felony-firearm conviction. The trial court also ordered Walls to serve his sentences consecutively and gave him credit for 459 days that he already served. On appeal, Walls argues that his trial lawyer did not render effective assistance and, as a result, he is entitled to a new trial. He also argues that his sentence was invalid. Because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

Walls' convictions stem from the shooting of Jennifer Brantley in July 2010. Walls and Brantley had a daughter together, but Brantley had custody. Brantley also had two boys. By April 2010, Walls resided at Brantley's home with the children.

Evidence showed that Walls had a volatile relationship with Brantley. In April or May 2010, Brantley sought a personal protection order after Walls attacked and threatened to kill her. She also moved out of her home in May 2010, but left many of her belongings. She retrieved some of her items in May or June 2010 with police officers because she feared Walls.

On the day at issue, Brantley returned to her home to get the rest of her items and clean the house. She believed that it was safe to return home because Walls had left the state. Brantley met her friend, William Johnson, with whom she used to work, and his friend, Charles Moody, at the house. They arrived at around 6:00 p.m. and she removed bags of clothing and

toys. At some point, she and Johnson went to the store. After they returned, she saw Walls in the neighbor's backyard.

Brantley testified that she was parked in the driveway when Walls approached from the rear of the driver's side and stated: "Bitch, where's my daughter." She said he had a shotgun and began to fire. She was hit in the back of her shoulder and another shot grazed her neck. Johnson and Charles ran.

Charles testified that he was present because Johnson asked him to help a friend move. He stated they were preparing to leave at around 6:00 or 7:00 p.m. Brantley was seated in the driver's seat of her car and he was about to get in the rear passenger's side when he heard a shot. The man pointed a shotgun at him and Charles said, "I don't know her or you. I was just here to clean up." The man pointed the shotgun away and fired a second time and Charles ran. The man fired five or six shots. Charles described the man as a black male, who weighed approximately 180 pounds.

A neighbor testified that she opened her front door on the day at issue and saw Walls standing in the middle of her yard firing a pump shotgun toward Brantley's car. He fired four shots. She shut her door and called 911.

After the jury convicted Walls, he appealed and asked this Court to order a remand for an evidentiary hearing on his claim that he did not receive the effective assistance of counsel. Specifically, he claimed that his trial lawyer should have moved to strike a juror who was related to a witness for the prosecution, should have called to other neighbors who witnessed the shooting, and should have presented evidence that Walls was actually in Toledo at the time of the shooting. This Court granted the request for a remand and ordered the trial court to consider Walls' request for a new trial.¹

The trial court held the evidentiary hearing in May and June 2013. The trial court held a hearing on Walls' motion for a new trial in July 2013. The trial court recalled that Walls and his lawyer were "buzzing" about the juror and stated its belief that the juror could have been excused for cause. Nevertheless, it found that Walls had instructed his lawyer to keep the juror and also found that Walls' jury was impartial. The trial court also found that the witnesses would not have aided Walls' case. The trial court also concluded that there was no reasonable probability that Walls would have been acquitted, even if the witnesses had testified. For these reasons, the trial court denied Walls' motion for a new trial.

We now consider Walls' appeal.

¹ See *People v Walls*, unpublished order of the Court of Appeals, entered September 21, 2012 (Docket No. 307647).

II. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

This Court reviews de novo whether a defendant's trial lawyer's conduct fell below and objective standard of reasonableness under prevailing professional norms and prejudiced the defendant's trial as a question of law. *People v Gioglio (On Remand)*, 296 Mich App 12, 19-20; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864. However, where—as here—the trial court has held an evidentiary hearing, this Court will review the trial court's factual findings for clear error. *Id.* at 20.

B. JUROR ERROR

On appeal, Walls argues that his lawyer's failure to strike juror Asia Moody, who is Charles' older sister, amounted to ineffective assistance of counsel. "To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 22 (citation and internal quotation marks omitted).

During voir dire, Moody informed the court that she was related to Charles. She stated that she did not see Charles and further indicated that she would not regard his testimony any differently than any other witnesses.

At the evidentiary hearing, Moody testified that she served as the foreperson for the jury. She testified that there were only one or two other African-American jurors on the jury. Walls' lawyer testified that he did not question Moody further about her relationship to Charles and did not move to excuse her because Walls wanted to retain as many African-American jurors as possible. According to Walls' lawyer, he discussed the issue with Walls and Walls expressly stated that he did not want her removed. The trial court believed Walls' lawyer's testimony.

On this record, we conclude that Walls failed to establish that his lawyer's decision to keep Moody on the jury or question her further amounted to ineffective assistance. "[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy, which we normally decline to evaluate with the benefit of hindsight." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001) (citations omitted). In addition, this Court must presume that Walls' lawyer's decision fell within the wide range of reasonable professional assistance if we can conceive of any strategic reason for the decision. *Gioglio*, 296 Mich App at 22-23.

Here, Walls' lawyer testified that his decision was strategic; he stated that he made the decision after consulting with Walls and after Walls expressed a desire to retain the juror. The trial court found that Walls' lawyer did consult with Walls and only retained the juror after Walls agreed to do so. And we will not second-guess that finding on appeal. *Id.* at 24 (stating that this Court must defer to the trial court's superior ability to judge credibility at an evidentiary hearing). Although one might agree with Walls' contention that a reasonable lawyer would have further explored the nature of the juror's relationship with the prosecutor's witness before agreeing to retain the juror, on these facts we cannot conclude that Walls' lawyer's decision not

to do so fell below an objective standard of reasonableness under prevailing professional norms. A reasonable lawyer might conclude that having a diverse jury is more important than excusing a juror related to a witness—especially given the juror’s testimony that she does not see the witness regularly and would treat his testimony the same as any other witness’ testimony. See *People v Edmond*, 86 Mich App 374, 398; 273 NW2d 85 (1978) (noting that a juror’s relationship with a witness does not necessarily disqualify the juror). Therefore, we cannot conclude that the decision fell below an objective standard of reasonableness. *Gioglio*, 296 Mich App at 22. Moreover, we cannot agree that there is a reasonable probability that the outcome would have been different had Walls’ lawyer moved to excuse the juror. *Id.* Although Charles was an eyewitness, he did not know Walls. In contrast, Brantley and the neighbor who testified at trial both knew Walls and both unequivocally identified him as the shooter. This evidence was further corroborated by the physical evidence. Consequently, even if Walls’ lawyer’s decisions not to further question Moody or excuse her from the jury could be said to fall below an objective standard of reasonableness, those decisions would not warrant relief. *Id.*

C. FAILURE TO CALL WITNESSES

Walls also contends that his lawyer was ineffective in failing to present the testimony of two eye witnesses who would have purportedly established that Walls was not the man who shot Brantley. Whether to call a witness is generally a matter of trial strategy. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012).

At the evidentiary hearing, one of the proposed witnesses testified that he heard gunshots and then saw three men running. One of the men, a black male, had a gun. The man with the gun ran through his yard and the other two men ran down the street.

The other proposed witness testified that he lived next door to Walls. He did not see Walls on the day of the shooting. He stated that he did see a black man run through his backyard, but did not see his face. He testified that, on the basis of his view of the left side of the man’s face, the man was not Walls. The man was not carrying a weapon at the time. However, this witness had a criminal record and came into contact with Walls in the county jail.

Walls’ lawyer testified that he was aware of the first witness, but did not call him because his description of the shooter from police reports matched Walls. He also agreed that Walls told him that there was someone at the county jail who was willing to testify, but he did not contact that witness because Walls told him that the witness would merely testify that he did not see Walls in the neighborhood on the day at issue. Walls’ lawyer believed that such testimony would not have been helpful.

On this record, we cannot conclude that Walls’ lawyer’s decision not to use these witnesses fell below an objective standard of reasonableness. *Gioglio*, 296 Mich App at 22. Given the inherent weakness in their proposed testimony, Walls’ lawyer could reasonably conclude that it would not be useful to call either witness. One witness stated that he did not see the shooting and could not say whether the man he saw was the shooter. The other witness’ description actually matched Walls and might have permitted an inference that Walls was the shooter. Even when considered in conjunction, the witnesses’ testimony did not clearly

exculpate Walls. As such, it is not reasonably probable that, had these witnesses testified, the outcome would have been different. *Id.*

Walls failed to establish that his trial lawyer provided ineffective assistance warranting relief.

III. SENTENCING ERROR

Walls next argues that the trial court violated his constitutional rights by engaging in impermissible judicial fact-finding to increase the mandatory minimum sentence applicable to his conviction of assault with intent to murder. Walls relies on the recent decision in *Alleyne v United States*, 570 US ____; 133 S Ct 2151; 186 L Ed 2d 314 (2013), for the proposition that the trial court could not rely on judicial fact-findings to increase the mandatory minimum sentence under Michigan's sentencing scheme. However, this Court recently held that the decision in *Alleyne* does not implicate Michigan's sentencing scheme. See *People v Herron*, ____ Mich App ____, ____; ____ NW2d ____ (2013) (Docket No. 309320). Accordingly, this claim of error does not warrant relief.

There were no errors warranting relief.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly
/s/Michael J. Riordan